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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS CHARLES HAGINS,

Defendant and Appellant.

C065553

(Super. Ct. No.  
CRF 09-283)

In this appeal, defendant Marcus Charles Hagins contends the trial court violated Penal Code section 654 by sentencing him to multiple punishments for what was an indivisible course of conduct. He also claims the court violated his constitutional right to a jury trial by requiring him to register as a sex offender and abide by concomitant residency restrictions based on facts that were not found true beyond a reasonable doubt by a jury. We disagree with his contentions and affirm the judgment.<sup>1</sup>

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<sup>1</sup> Undesignated references to sections are to the Penal Code.

## FACTS

19-year-old Lindsey W. awoke early on May 15, 2009, to find a man, defendant, putting tape over her mouth. Defendant told her he would slit her throat if she said a word. He also put tape over her eyes.

Defendant next told Lindsey to roll over onto her stomach. He threatened to kill everyone in the house if she did not follow his orders. He held a sharp blade to her throat.

Defendant taped Lindsey's hands together behind her back. He also taped her ankles together. He turned her head onto its side and warned her again not to speak.

Defendant then removed the tape from Lindsey's mouth. He told her to open her mouth, but she refused. Defendant pried her mouth open with his hand, and he inserted a ball gag. At about that time, Lindsey's mother kicked open the bedroom door, and defendant fled out of the house.

Defendant's fingerprints were found on Lindsey's bedroom doorknob and on some of the duct tape found at the scene. While being fingerprinted at his arrest, defendant physically resisted the procedure.

Experts searching defendant's computer found images involving ball gags. The images, depicting young women including Lindsey and other acquaintances of defendant, had been altered by a graphics program to depict the women with ball gags in their mouths and bindings around their hands and feet.

The experts also found commercial bondage pornography on defendant's computer. One expert found over 8,000 commercial

bondage pornographic images. A commercial bondage video found on the computer was played for the jury.

A jury convicted defendant of assault with a deadly weapon (§ 245, subd. (a)(1)); making a terrorist threat (§ 422); and false imprisonment by threat or violence (§§ 236, 237). It acquitted defendant of assault with the intent to commit rape (§ 220, subd. (b)); and burglary (§ 459).

The court sentenced defendant to a prison term totaling five years four months, calculated as follows: the upper term of four years for the assault with a deadly weapon, plus consecutive terms of eight months (one-third the midterm) for the terrorist threat and false imprisonment counts. Under the discretionary authority granted it by section 290.006, the court also ordered defendant to register as a sex offender for life. This registration obligation also imposed residency restrictions on defendant pursuant to section 3003.5, subdivision (b).

Defendant appeals and raises two contentions. First, he asserts the court's sentencing him for criminal threats and false imprisonment in addition to assault with a deadly weapon violates section 654's prohibition of multiple punishments for an indivisible course of criminal conduct. Second, he claims the court erred by imposing the residency restriction based on facts that were not found by a jury to be true beyond a reasonable doubt.

## DISCUSSION

### I

#### *Multiple Punishments*

The trial court determined multiple punishments were not barred by section 654 because defendant harbored separate intents and objectives for each of his convictions. The court found defendant's objective in assaulting the victim with a deadly weapon was to establish his power over her and have her comply with his demands without question. His threat against her family, separate from the original threat against her, was a gratuitous terrorizing act of violence separate from his other crimes. And his objective in falsely imprisoning the victim was to ensure she was a captive as a first step towards achieving his sexual fantasy and to prevent her from fleeing.

Defendant contends section 654 barred the court from imposing multiple punishments because he harbored only a single intent: to bind and gag the victim. He asserts the false imprisonment and the criminal threats were only means to accomplish his intent and thus could not be separately punished. We disagree.

Section 654 does not prohibit multiple punishments where a course of conduct is divisible based on independent objectives and gives rise to more than one act. "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any

one of such offenses but not for more than one.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 334.)

“On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.]” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212.)

“The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial. (*People v. Murphy* (1980) 111 Cal.App.3d 207, 213.) The factual finding that there was more than one objective must be supported by substantial evidence. (*People v. Macias* (1982) 137 Cal.App.3d 465, 470.)” (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Here, the trial court’s finding of different objectives for each of the convictions is supported by substantial evidence. Defendant assaulted the victim with a knife to gain unlawful dominion and control over her. He bound her with tape as part of his sexual fantasy. And, after first threatening to kill the victim, he also threatened to kill her entire family, a threat

that was gratuitous and unnecessary to accomplish either the assault or the imprisonment.

Because defendant harbored multiple criminal objectives that were independent from each other, section 654 did not bar the court from imposing multiple punishments.

## II

### *Right To Jury Trial on Facts Supporting Registration*

Subdivision (b) of section 3003.5, enacted as part of Jessica's Law in 2006, provides that "[n]otwithstanding any other provision of law, it is unlawful for any person for whom [sex offender] registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

Defendant contends this residency restriction makes sex offender registration "punishment," and thus the facts required for the trial court to impose a sex offender registration requirement under section 290.006 had to be found true by a jury beyond a reasonable doubt under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and its progeny. Because no such jury finding was made here, defendant contends his registration requirement should be stricken from the judgment.

This issue is currently pending before our Supreme Court. (*People v. Mosley*, S187965, review granted Jan. 26, 2011.) However, we will assume for the sake of argument that the trial court erred in requiring defendant to register as a sex offender without having a jury find the predicate facts required to

impose a registration requirement under section 290.006. The question before us then becomes whether the court's failure to submit the factual issue to a jury was prejudicial. It was not.

*Apprendi* error is not reversible per se, and under *People v. Sandoval* (2007) 41 Cal.4th 825, the test for prejudicial error is whether we are convinced beyond a reasonable doubt a jury would have made the factual finding necessary for the court to impose the sex offender registration requirement on defendant under section 290.006. We are.

As our Supreme Court explained about applying the predecessor statute to section 290.006 (former section 290, subdivision (a)(2)(E)), "the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197.)

Thus, the only factual finding section 290.006 requires be made before the trial court may exercise its discretion to impose registration is a finding "that the person committed the offense as a result of sexual compulsion or for purposes of

sexual gratification." Here, we conclude beyond a reasonable doubt that a jury would have made this finding.

The evidence in support of the court's finding is overwhelming. Defendant had numerous pictures on his computer of the victim and other female acquaintances that had been altered to depict ball gags and bindings. The computer also contained approximately 46 videos graphically depicting bondage scenes. According to the court, at least one of these videos was highly similar to the attack on the victim, including the use of many of the same phrases.

Experts found on the laptop computer hard drive, but deleted from the allocated portion of the computer, thousands of images of a sexually graphic nature depicting sexual bondage, general pornography, and bondage implements. In many of these images, the women were gagged with a ball gag. The experts also located hundreds of pages of search results for rape and ball-gag-related terms. In addition, approximately 16 pages of rape-related searches were located on a desktop computer at defendant's residence.

A certified specialist in sex offender treatment concluded in a presentence report that, based on defendant's acts and the images found on his computer, defendant is a dangerous offender who committed the present offense for sexual gratification. The specialist stated the material found on defendant's computers was linked to his actions in this case. And a normal progression for an offender would be to act out their fantasies as their need for sexual gratification increased. The



specialist concluded the level of planning and thought defendant invested in the present offense makes him an extremely dangerous offender who is likely to reoffend.

There is no doubt a jury faced with this evidence would have determined defendant committed his offenses as a result of sexual compulsion or for purposes of sexual gratification. That the court made this finding instead of a jury in this instance did not prejudice defendant.

DISPOSITION

The judgment is affirmed.<sup>2</sup>

\_\_\_\_\_, NICHOLSON, J.

We concur:

\_\_\_\_\_, RAYE, P. J.

\_\_\_\_\_, BUTZ, J.

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<sup>2</sup> Defendant's second motion for calendar preference and expedited review is denied as moot.